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CHARLES ELMORE DROPLEY

**Supreme Court of the United States**

OCTOBER TERM, 1946

No. 1199

SHAPIRO, BERNSTEIN & CO., INC.,

*Petitioner,*

*against*

JERRY VOGEL MUSIC CO., INC.,

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE SECOND CIRCUIT AND BRIEF IN SUPPORT  
THEREOF**

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CHARLES E. HUGHES, JR.,

*Counsel for Petitioner.*

LEO J. ROSETT,

RICHARD W. HOGUE, JR.,

EDWARD A. NILES,

*Of Counsel.*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1946

No.

SHAPIRO, BERNSTEIN & Co., INC.,  
*Petitioner,*

*against*

JERRY VOGEL MUSIC Co., INC.,  
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE SECOND CIRCUIT**

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit in the above-entitled action entered on December 10, 1946, which reversed a judgment of the United States District Court for the Southern District of New York in favor of petitioner entered on November 20, 1945.

The action arose under the Copyright Act (Act of March 4, 1909, c. 320, 35 Stat. 1075, U. S. C., Tit. 17) and was brought under the Declaratory Judgments Act, Judicial Code, Sec. 274 (d) (added to Act of March 3, 1911, c. 231, by Act of June 14, 1934, c. 512, 48 Stat. 955, and amended August 30, 1935, c. 829, sec. 405, 49 Stat. 1027; U. S. C. Tit. 28, sec. 400).

### JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on December 10, 1946 (R. 262-263).

On February 24, 1947, respondent made a motion in the Circuit Court of Appeals for an order to recall the mandate of that court, to clarify its opinion of December 10, 1946, and to amend its judgment thereon entered December 10, 1946 (R. 263-277). The order of the Circuit Court of Appeals, entered March 19, 1947 (R. 279), ordered that its opinion of December 10, 1946 be clarified in accordance with its *per curiam* opinion on said motion handed down on March 18, 1947, but in all other respects denied the motion.

On March 3, 1947, Mr. Justice Jackson signed an order extending to April 10, 1947, the time for filing a petition for certiorari herein (R. 280).

The jurisdiction of this Court is invoked under Judicial Code, Section 240 (a), as amended by Act of February 13, 1925, c. 229, 43 Stat. 938, U. S. C. Tit. 28, Section 347.

### OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 256-262) is reported at 158 F. (2d) 759. The *per curiam* opinion of the Circuit Court of Appeals (R. 278-279), on respondent's motion for clarification, is not yet officially reported.

The opinion of the District Court (R. 230-235) is not yet officially reported.

### STATUTE INVOLVED

The statute involved is the Copyright Act of 1909, above cited, the pertinent provisions of which are printed in the Appendix, *infra*.

### QUESTIONS PRESENTED

1. If a song, already copyrighted by the author of the music, is later published, with the same music but new words, and this version is copyrighted by the publisher as a new work under Section 6 of the Act, is the author of the original unchanged music an author also of the new version, so as to be entitled, under Section 23 of the Act, to renew the copyright on the new work?

2. Where, in a new version of a copyrighted song, the original music is used unchanged and only the words are rewritten, and the author of the old music does no work on the new version or with the author of the new words, are they joint authors of the new version, so that a renewal of the copyright thereon by the original author of the music inures to the benefit also of the author of the new words, or the statutory successor to the latter's renewal right?

3. Where a song, already copyrighted by the author of the music, is later published, in a new version having the same music but new words, and the publisher's copyright notice gives notice only of the original copyright by the author of the music, the year of that copyright and the transfer of that copyright to the publisher during the year of his publication, does such notice satisfy the requirements of Section 18 of the Act, and give the publisher a valid copyright on the new version as a new work under Section 6 of the Act?

### STATEMENT

Petitioner brought this action in the District Court under the Declaratory Judgments Act (Complaint, R. 4-16),

claiming by assignment, and praying for a declaration that it is the owner of the renewal copyright on the song originally entitled "Melancholy", later entitled "My Melancholy Baby"; and for an injunction against the threatened publication thereof by respondent and for other relief. In its amended answer, respondent set up a defense and counterclaim (R. 24-26) claiming the rights of a co-owner for the renewal term and praying for an accounting from petitioner and an injunction against petitioner representing itself to be the sole and exclusive owner of the copyright.

The essential facts are not in dispute:

In 1911, Ernie Burnett wrote the music, and Maybelle E. Watson (then his wife) wrote the words, of a song entitled "Melancholy" (Finding of Fact 1, R. 236; R. 82; Ex. 2, R. 142-145). Burnett copyrighted it as an unpublished work and deposited a copy in the Copyright Office, as required by Section 11 of the Act, on October 31, 1911; thereafter Burnett and his wife played and sang the song in public performances (Finding of Fact 1, R. 236; Ex. 1, R. 142). Burnett and Maybelle E. Watson (then Maybelle E. Watson Bergmann) in 1939 separately secured renewals of this 1911 copyright (Exs. 12, 13, R. 157-158). These they assigned to petitioner (Exs. 14, 16, R. 159-160, 162-163).

In June, 1912, Burnett offered to sell this song to Theron C. Bennett, a music publisher. Bennett liked the music but did not like the words, and called in George A. Norton to write new words (Finding of Fact 2, R. 236; R. 43-46, 83-85). Burnett's music was not changed, and he did no work on this version, either alone or with Norton (Finding of Fact 2, R. 236; R. 90).

On August 1, 1912, Burnett assigned his 1911 copyright to Bennett (Complaint, Par. Twenty-third, R. 5,

admitted in Amended Answer by failure to deny, R. 20). This was after Norton's new lyrics were ready (R. 91, 146). This assignment was recorded with the Copyright Office; its Certificate noted: "Lyrics now by Geo. A. Norton" (Ex. 3, R. 145-146). Norton took out no copyright on his lyrics, but on September 23, 1912, he, as sole owner and author thereof, transferred the lyrics to Bennett (Ex. 23, R. 171).

On October 25, 1912, Bennett published an edition of the song "Melancholy" (Ex. 4, R. 146) which stated that the words were by George A. Norton and the music by Ernie Burnett. It bore the following coyright notice:

"Copyright MCMXI by Ernie Burnett  
Copyright transferred MCMXII to Theron C. Bennett,  
Denver, Colo."

Bennett never deposited with the Copyright Office copies of the song as so published in 1912. On January 10, 1939, Joe Morris Co., claiming through mesne assignments (Exs. 8, 9, R. 151-152), deposited two copies thereof, with claim of copyright (Ex. 5, R. 148).

On December 2, 1939, Burnett filed application for renewal on this 1912 version (Ex. 15, R. 161). He assigned this renewal to petitioner, together with the renewal of his 1911 copyright above mentioned (Ex. 16, R. 162-163).

Norton, the author of the words of the 1912 version, died in 1923 during what would have been the original term of the alleged copyright thereon (R. 24, 26-27, 105). He left no widow (Ex. A. R. 172), but did leave a son, Charles E. Norton (R. 30). The son made an assignment to respondent of all renewal copyrights on his father's

writings, including the song in question (Ex. F, R. 195-198). The son did not apply for renewal on the 1912 version, but respondent asserts that Burnett's renewal inured to his benefit.

There was a third version of the song as to which, however, no question is presented herein. It was published by Bennett with a copyright notice in 1914 (Ex. 6, R. 148). It simply added a chorus in march time and changed the title to "My Melancholy Baby" (R. 95, 149, 95). It was registered for copyright by Joe Morris Music Co. in 1938 (Ex. 7, R. 150). Burnett applied for renewal on this version (Ex. 17, R. 164), and assigned it to petitioner (Ex. 18, R. 165). Charles E. Norton, the son, applied for renewal on this version (Ex. G, R. 199) and assigned it to respondent under the assignment already mentioned (Ex. F, R. 195-198). The court below did not discuss in its opinion of December 10, 1946 any question relating to the rights of the parties under these applications to renew the 1914 copyright. In its *per curiam* opinion of March 18, 1947 it left such questions to be later dealt with by the District Court.

The District Court's judgment of November 20, 1945, (R. 246-250) declared: that petitioner is the proprietor of the 1911 version, words by Maybelle E. Watson, music by Burnett, and of the renewal copyrights thereon; that no copyright protection exists for Norton's lyrics and that those lyrics are in the public domain; that petitioner is the proprietor of the music and the title "Melancholy" under which the song was published in 1912, and of the music and the title "My Melancholy Baby", published in 1914 and the renewal copyrights thereon. An injunction was granted (R. 248) against publication by respondent of the whole or any part of the musical composition, music by Burnett, lyrics



by Maybelle E. Watson, or the titles, this injunction, however, not to be applicable to Norton's lyrics. The counterclaim was dismissed on the merits (R. 249).

The Circuit Court of Appeals reversed the judgment. It held (R. 256-262): that Bennett obtained a valid copyright on the 1912 version as a "new work" under Section 6 of the Copyright Act, although his copyright notice on the publication of that version referred only to Burnett's copyright of 1911 and to the transfer of that copyright to him in 1912; that Burnett's attempted renewal of the alleged 1912 copyright was valid, although he had done no work on the 1912 version, and was timely; that Burnett and Norton were joint authors of the alleged new work, although Burnett's music was unchanged and had already been copyrighted, and Burnett had not worked with Norton on the 1912 version; and that therefore Burnett's renewal of the 1912 copyright inured to the benefit of Norton's son and passed by the latter's assignment to respondent.

#### **SPECIFICATION OF ERRORS TO BE URGED**

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding that Bennett obtained a valid copyright on the 1912 version of the song.
2. In holding that Burnett and Norton were joint authors of the 1912 version.
3. In holding that Burnett's attempted renewal of copyright on the 1912 version of the song was valid and timely.

4. In holding that any renewal of copyright by Burnett on the 1912 version of the song inured to the benefit of Norton's son.

### REASONS FOR GRANTING WRIT

The court below has decided important questions arising under the Copyright Act of 1909 in such a way that its decision, if permitted to stand as an authoritative precedent, would greatly extend and enlarge the copyright monopoly, without warrant, we submit, in the terms of the Act or its previous judicial interpretation.

On the first of the questions here presented (*supra*, p. 3), the decision below, giving to Burnett, the author of the music of the original version of the song, a further renewal copyright on a later version to which he contributed no additional labor, is out of harmony with the intent of Congress in the Copyright Act to confer the copyright monopoly only for the public purpose of stimulating, by suitably rewarding, productive effort in the arts and sciences, and especially with Section 23 of the Act; and is also, we submit, in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Harris v. Coca-Cola Co.*, 73 F. (2d) 370, on a parallel state of facts. Section 23 makes the renewal right, except in circumstances not present here, personal to the "author" of the copyrighted work, or his statutory successors designated therein, as distinguished from the proprietor of the copyright being renewed. Burnett had already obtained copyright protection for the full fifty-six year period (original term and renewal) on the original version, to which alone he devoted creative effort, and the music of which was carried unchanged into the new version. He earned no status of

authorship with respect to the new version, which was new only by reason of the labors of another, Norton, in rewriting the words of the song. The decision is not justified by Section 6 of the Act, making other versions of works in the public domain, or of copyrighted works, subject to copyright as new works, because that section expressly provides that publication of such new works shall not secure or extend copyright in such original works. The consequence of the decision in giving the status of "author", with respect to the new work, to the writer of the unchanged element in a copyrighted original work, is in practical effect to extend his copyright monopoly for a period corresponding to whatever time may have elapsed between his copyrighting of the original work and the publication of the new work, which may be many years. And, since the new work may be based on original works which are in the public domain, as well as on works previously copyrighted, the effect of the decision is to give a fresh status of authorship to the writer of an uncopyrighted original work, which is carried unchanged into a new work, and to secure to him a wholly unearned renewal copyright on something which he had dedicated to the public. The question thus decided by the court below has not been, but should be, settled by this Court.

As to the second question presented, the decision below departed from previously established principles of the law of joint authorship and thereby greatly enlarged the category of persons entitled to interests in the copyright monopoly and to the benefit of renewals thereof. In view of the frequency with which songs are rewritten as to either the words or the music alone, the question is of manifest general importance. It has not been, but should be, settled by this Court.

As to the third question presented, the decision below so relaxes the requirements of Section 18 of the Act for the securing of a copyright as to make quite unclear what publications are and what are not copyrighted. Its holding that the validity of the copyright is to be determined, not by the plain words of the copyright notice, but by such uncertain factors as the undisclosed intention of the publisher, and what members of the public might ascertain by inquiry from him, puts the law in confusion and members of the public in peril of infringement in using works apparently not copyrighted. The decision is in conflict with the principles enunciated in applicable decisions of this Court.

The reasons for granting the writ, above stated, will be further developed in the ensuing brief in support of the petition. Since the decision below affects in important aspects the proper interpretation of the Copyright Act, it should be reviewed by this Court (*cf. Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U. S. 643).

Respectfully submitted,

CHARLES E. HUGHES, JR.,  
*Counsel for Petitioner.*

LEO J. ROSETT,  
RICHARD W. HOGUE, JR.,  
EDWARD A. NILES,  
*Of Counsel.*

April 4, 1947.

**BRIEF IN SUPPORT OF PETITION FOR CERTIORARI**

References to the opinions of the court below and the grounds of jurisdiction, as well as a statement of the case, questions presented and specification of errors to be urged, are contained in the petition and will not here be repeated. The pertinent provisions of the applicable sections of the Copyright Act are printed in the Appendix, *infra*.

**ARGUMENT****I.**

**BURNETT WAS NOT AN AUTHOR OF THE 1912 VERSION OF THE SONG WITHIN THE MEANING OF SECTION 23 OF THE ACT, AND HAD NO STANDING TO OBTAIN A RENEWAL OF ANY COPYRIGHT THEREON.**

**THE CONTRARY DECISION OF THE COURT BELOW IS OUT OF HARMONY WITH THE PURPOSE AND INTENT OF THE COPYRIGHT ACT, AND IS IN CONFLICT WITH A DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT ON A PARALLEL STATE OF FACTS.**

Burnett wrote the music of a song which he copyrighted on October 31, 1911. As an author of that original version of the song he obtained a renewal of the copyright thereon for the additional term of twenty-eight years from October 31, 1939. He exhausted his productive effort with his authorship of that music. The 1912 version, published by Bennett on October 25, 1912, used his music without change, but the words of the song were rewritten by Norton. Norton was the only person who expended additional creative effort to make that version a new version. But the court below held that Burnett, who had contributed nothing new to the 1912 version, was an author of it equally

with Norton, and so entitled to renew Bennett's alleged copyright on that version for a term of twenty-eight years from its expiration.

The purpose of copyright legislation is "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries". (Constitution, Art. I, Sec. 8, Clause 8). An exposition of the underlying intent of Congress in formulating and enacting the Copyright Act of 1909 appears in the report of the Committee on Patents of the House of Representatives\* (H. Rep. 2222, 60th Cong., 2nd Sess., p. 7) as follows:

"The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention, to give some bonus to authors and inventors.

In enacting a copyright law Congress must consider, as has been already stated, two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly."

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\*The Senate Committee adopted the report of the House Committee (See Sen. Rep. 1108, 60th Cong., 2nd Sess.), as stated by this Court in *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U. S. 643, 654.

Prominent among the "proper terms and conditions", required to strike an appropriate balance between the public benefit to be attained by stimulating creative writing through suitable rewards to authors, and the public detriment which would attend undue derogation of the public right of publication, were the provisions for the duration of the copyright monopoly. The report of the House Committee (pp. 14-15) on Section 23 of the Act (referred to by this court in *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U. S. 643, 653-654) shows the earnest consideration devoted by Congress to the question of what should be the total permissible term of the copyright, how that should be divided between the original term and the renewal term, and how and by whom the renewal might be obtained. The result was an enactment increasing the renewal term to twenty-eight years (equal to the length of the original term) and providing that, while the original copyright might be secured by the "proprietor" (Sec. 18) who might be either an author or a publisher, the renewal right was limited, except in circumstances not present here, to the "author" or, in case of his death, his widow or other designated relatives in the order specified.

In the latter provision Congress was obviously conferring the author an enlarged reward, and was strengthening his bargaining position as against the publisher (see 318 U. S. p. 651). That raises to special importance questions of what persons may, consistently with the underlying purpose of copyright legislation, be included in the category of "authors" to whom this renewal right shall accrue. For, just as it is important that true authorship should not be denied the intended reward, it is equally important that loose interpretation of the term "author" in



this statutory setting should not result in persons enjoying that reward who have done nothing to earn it.

Burnett's copyright of 1911 entitled him, under Section 23, to the exclusive right to the only thing he created and to the privilege up to October 31, 1939,\* to renew the copyright upon it. That was his full reward; and the only reward consonant with the purpose of the statute, unless he should perform additional labor on the song.

That was the decision of the Circuit Court of Appeals for the Fifth Circuit in *Harris v. Coca-Cola Co.*, 73 F. (2d) 370 (1934), which involved a parallel factual situation, and with which, we submit, the decision below in the instant case is in conflict. That case concerned the book "Uncle Remus, His Songs and His Sayings", by Joel Chandler Harris. It was first copyrighted by a publisher in 1880, with illustrations by Church and Moser, in the preparation of which Harris had made criticisms and suggestions. It was copyrighted again in 1895 by the same publisher, without change of Harris's text but with new illustrations by Frost, with which Harris, though praising them cordially, had had nothing to do. Harris's widow renewed in 1908 the 1880 copyright for fourteen years from the date of its expiration (that being the extent of the renewal term prior to the Act of 1909), and before the expiration of that renewal made application under the Act of 1909 for the additional renewal term of fourteen years

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\*Section 23 fixes the original term of the copyright as twenty-eight years from the date of "first publication". But, when the copyright has been secured, not by publication with notice of copyright under Section 9, but as an unpublished work by deposit of a copy under Section 11 as here, the term is twenty-eight years from the date of deposit. *Marx v. United States*, 96 F. (2d) 204, 206 (C. C. A. 9th, 1938).



provided by Section 24 thereof in such circumstances. The Coca-Cola Company used Frost's illustrations in its advertising and Harris's widow sued for infringement. The Court held that she had no standing to bring such a suit.

The decision turned, as does the decision in this case, on the extent of the renewal right. If Harris had the status of "author" of a work covered by a copyright which protected both Harris's text and Frost's later illustrations, Mrs. Harris had a right to renew that copyright, and hence had a good suit for infringement.

The District Court had held, on motion to dismiss Mrs. Harris's bill (1 F. Supp. 713 (D. C. N. D., Ga., 1932) at pp. 715-717), that "the copyright of 1880 was broadened by the proceedings taken in 1895 to include the Frost illustrations",\* and that Mrs. Harris's renewal of that copyright preserved to her the copyright on the book and the illustrations, to the extent that the evidence might show them to be copyrightable; and so over-ruled the motion to dismiss. On final hearing, the District Court dismissed the bill, on the ground that no copyrightable matter had been used by the Coca-Cola Company. The Circuit Court of Appeals was apparently not in agreement with that ground (73 F. (2d) p. 370); but held that the case reached a right result on the merits because the copyright of Mrs. Harris, that is, her renewal copyright (see p. 372), did not cover the illustrations in the 1895 edition. Judge Sibley, writing for the unanimous court, said (p. 371):

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\*Section 5 of the Act of March 3, 1891, 26 Stat. 1106, 1108, provided that the proprietor of every copyrighted book should deposit with the Librarian of Congress "a copy of every subsequent edition wherein any substantial changes shall be made". The clear implication was that the original copyright was intended to be enlarged to cover the new edition.

"The great purpose of a copyright is to secure to authors and artists the financial fruits of their own mental labors. The initial copyright period is frequently assigned to a publisher with but little gain to the author. If the work proves meritorious and successful, the author may have had but little benefit. The second period is intended, not as an incident of the first for the benefit of the then owner of the expiring copyright, but as a second recognition extended by the law to the author of work that has proven permanently meritorious by giving directly to him if alive, or, if not, to his widow, children, next of kin or executor (but not to an administrator who may represent no relative and no wish of the author), a supplementary copyright upon the terms stated in the statute."

The Court then traced the historical development of that intent as revealed in the several copyright acts, which this Court later similarly traced in *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U. S. 643 (1943), and concluded (p. 371):

"This history, culminating in the present provisions of law, makes it very plain that the second period, now called a renewal or extension, is afforded to the author or his relatives or his executor for the author's own work and because of its merit. It does not extend to another's work, although associated in the same book."

In the *Coca-Cola* case, as here, the work was a joint work to begin with, one element contributed by one author and the other element by another. There, as here, only one of the elements was changed in a later publication. In

the instant case the decision that the original author of the unchanged element was also an "author" of the new publication, equally with the producer of the new matter, was placed on the ground that the latter publication was a "new work" covered by a new and independent copyright. In the *Coca-Cola* case the contention that Mrs. Harris's renewal of the original copyright entitled her to sue for infringement of the new illustrations was placed on the theory that the 1895 copyright had enlarged the original copyright to include them. The Circuit Court of Appeals held that it was unnecessary to decide whether the copy-righting of the 1895 publication "resulted in a new copyright effective to protect the new matter in the new edition of the book for a new copyright term, or whether it enlarged the original copyright to protect for its term the added matter" (p. 372). But, if the Court had entertained any idea that Harris could be held to occupy the status of "author" of the 1895 publication, the Court would have had to decide that question. It would have been the controlling question in the case. Because Mrs. Harris had not applied for renewal of the 1895 copyright, and she had renewed the 1880 copyright. But the Court said (p. 372):

"In neither case would Mr. Harris be the author of the new illustrations, which were neither created nor paid for by him."

The conflict of decision is therefore apparent. It is true that the Court in the *Coca-Cola* case did not discuss the law of joint authorship. But the facts raising that question were stated in detail in the opinion, and they parallel so closely those of the instant case, that the question was

necessarily involved.\* It is inevitable that that case and this one will be regarded as representing conflicting holdings on an important and frequently recurring question of copyright law. In *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. (2d) 266, a joint-authorship case which was relied upon by the court below on that branch of the instant case, the Circuit Court of Appeals found it necessary to distinguish on the facts the *Coca-Cola* case, as we show in Point II (*infra*, p. 24). It is important to the consistent development of copyright law that that conflict be resolved by this Court.

Nor is it of consequence that Section 6 of the present Act, which had no counterpart in the Copyright Act of 1831 in force when the 1895 copyright in the *Coca-Cola* case was obtained, was not involved in that decision. There is nothing, we submit, in that section which changes the issue under Section 23.

Section 6 provides that "Compilations or abridgements, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent\*\* of the proprietor of the copyright in such works", are to be regarded as "new works subject to copyright" under the other provisions of the Act.

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\*The relation between joint authors of a copyrighted joint work is one of tenancy in common (*Silverman v. Sunrise Pictures Corporation*, 273 Fed. 909, 914 (C. C. A. 2nd, 1921) and cases cited therein), and it is the essence of tenancy in common that it inheres in the whole property and that the ownership of neither tenant is limited to the particular element which constituted his individual contribution.

\*\*Burnett gave his consent, but the quoted language makes plain that he did so as a "proprietor" of the 1911 copyright, not as an "author".

There is no doubt that the copyrighting of a new work under Section 6 creates new rights, in other or the same persons as the case may be, which are in addition to those flowing from the copyright status, if any, of the original work or works on which the new work is based. That is because new creative labor has gone into the production of the new work. (*Hartfield v. Peterson*, 91 F. (2d) 998, 1000 (C. C. A. 2nd, 1937); *Triangle Publications, Inc. v. New England Newspaper Pub. Co.*, 46 F. Supp. 198, 201, 202 (D. C. D. Mass., 1942, Wyzanski, J.). The fact of new labor is plain enough in the case of "compilations or abridgements, adaptations, arrangements, dramatizations, translations". But it is also plain that adequate additional labor must go into an "other version" to make it copyrightable under Section 6. "The propriety of separate and independent copyright always depends upon the presence or absence of original work". (Hough, C. J. in *Edmonds v. Stern*, 248 Fed. 897, 898 (C. C. A. 2nd, 1918); see 2 *Ladas, International Copyright*, p. 698; *Weil, Copyright*, pp. 162-163; *Howell, The Copyright Law*, pp. 66-67).

We submit that there is nothing in Section 6 which gives any countenance to the idea that copyright of a new work under that section confers a new status as an "author", for purposes of enjoyment of a renewal right, upon the persons whose original works, either in the public domain or the subject of existing copyrights, are included in the base material of the new work, but who have contributed nothing new to it. To the contrary, Section 6 provides explicitly that publication of the new works shall not "secure" or "extend" copyright in such original works. The verb "secure" of course applies to original works which are in the public domain, and the verb "extend" to original works

already copyrighted. The clause following the semicolon in Section 6, in which the phrases referred to appear, means that the rights of authors of the original works remain exactly as they were, unaffected by the copyrighting of the new work, unless by contributing new productive effort to the new work they acquire a separate status of authorship with respect to it.

Manifestly, the requirements for enjoyment of a renewal right must be predicated upon the status of authorship with respect to the particular copyright which it is proposed to renew. Therefore, Burnett's authorship of his music, which was the subject of his 1911 copyright, and which entitled him to renew that copyright, has nothing to do with the question of his authorship of the new work which Bennett published in 1912. Burnett earned his renewal right with respect to the former; he did nothing to earn any renewal right as to the latter.

Burnett's copyright on the original version expired October 31, 1939. The court below so recognized (R. 261). But it held that Burnett's application to renew copyright on the 1912 version was in time, though filed on December 2, 1939. The Court thus explained that holding:

*"Since that was a 'new and joint work' Burnett's renewal was valid." (Italics ours)*

Bennett published the 1912 version on October 25, 1912. Any copyright on that version, as well as the right to renew it, would accordingly not expire until October 25, 1940.\*

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\*It is true that the court below cut back to December 31, 1939 what would normally have been the copyright term of the new work published in 1912. But that was only because the court regarded Bennett as having made a "mistake" in stating the date as 1911, instead of 1912, in his copyright notice. Whether it

To accord to Burnett the status of "author" with respect to the 1912 version was to extend his enjoyment of the copyright monopoly, through the bargaining power which his right of renewal gave him, for twenty-eight years from that date, namely, to October 25, 1968.

The consequences of future applications of the decision below, which are reasonably to be anticipated, are momentous in their extension of the permitted duration of the copyright monopoly.

Suppose that Norton's rewriting of the words and Bennett's publication of the new version had taken place in 1922 instead of 1912. Burnett's monopoly through his renewal right on the new work would, on the Court's reasoning, extend until 1978. And the rewriting of the words,

---

was in fact a mistake is a question which we discuss in Point III. In holding Bennett's "mistake" in date to be immaterial, the court below relied upon *Callaghan v. Myers*, 128 U. S. 617, 657 (1888); *American Code Co. v. Bensinger*, 282 Fed. 829, 836 (C. C. A. 2nd, 1922) and *Southern Music Publishing Co. v. Bibb-Lang, Inc.*, 10 F. Supp. 972, 974 (D. C. S. D. N. Y., 1935). Those cases hold that where the mistake in the date is to claim copyright as of a year earlier than the actual year of publication, the mistake is one in favor of the public and the consequence of the designation of the earlier year is merely to reduce the term of the monopoly from twenty-eight years from the date of actual publication to December 31 of the twenty-eighth year after the year stated in the notice. Those cases have nothing to do with the situation here presented, where there was an existing copyright on the original work. And of course they have nothing to do with the duration of the copyright on the original work. That, under the plain terms of Section 23, is twenty-eight years from the exact date of publication or deposit, as the case may be, and not December 31 of the twenty-eighth year (see *M. Witmark & Sons v. Fred Fisher Music Co., Inc.*, 125 F. (2d) 949, 950 (C. C. A. 2nd, 1942) aff'd. 318 U. S. 643 (1943); *Rossiter v. Vogel*, 134 F. (2d) 908, 911 (C. C. A. 2nd, 1943)).



and the resulting new version, might have occurred as late as 1938, with extension of Burnett's monopoly to 1994.

Or suppose that Burnett, instead of copyrighting the song in 1911, had published it without copyright notice and hence dedicated it to the public. If later, perhaps many years later, a publisher brought out a new version with a copyright notice claiming a new work under Section 6, with Burnett's same uncopyrighted music but with new words, should Burnett be deemed an author of the new version, so as to have a right to renew the copyright thereon? The necessary result of the decision below is that he should. For the "other versions" which, under Section 6, are to be regarded as "new works subject to copyright" as such, may, under the express terms of that section, be based upon "works in the public domain" as well as upon works already copyrighted. And there would seem to be no ground for differentiating between the two situations so far as questions of "authorship" are concerned. If that is so, the decision below opens a very easy way for a composer to avoid the consequences of his earlier dedication.

## II.

**BURNETT AND NORTON WERE NOT JOINT AUTHORS OF THE 1912 VERSION WITHIN THE RULE THAT A RENEWAL OF COPYRIGHT BY ONE JOINT AUTHOR INURES AS WELL TO THE BENEFIT OF THE OTHER.**

Even if it should be held, contrary to our contention in Point I, *supra*, that Burnett was an "author" of the 1912 version so as to have a right to renew the copyright thereon, it does not follow from that alone that his renewal inured to the benefit of Norton's son, as Norton's statutory suc-



cessor under Section 23. That depends upon whether Burnett and Norton were joint authors of the 1912 version.

The leading authority on joint authorship is the English case, *Levy v. Rutley*, L. R., 6 C. P. 523 (1871). Levy had employed Wilks to write a play for him, which Wilks did. Levy, finding that some of the incidents were objected to by members of the cast, made various alterations and additions, one scene being entirely new. Wilks died. Defendant pirated the drama and Levy sued. It was held that he could not recover since his work did not constitute him a joint author of the play. The court's definitions of "joint ownership", which have become classic, were: "a joint labouring in furtherance of a common design" (per Keating, J., p. 529); and agreement "to write a piece, there being an original joint design" (per Montague Smith, J., p. 530).

The case relied upon by the court below on this point was *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. (2d) 266 (C. C. A. 2nd, 1944). The opinion in that case recognized *Levy v. Rutley* as the leading authority on the question and expressly accepted (p. 267) the definitions of "joint authorship" enunciated therein, as above quoted. We know of no decision until the instant one which is inconsistent with them.

The facts of the instant case do not fit those definitions. There was "joint laboring in furtherance of a common design" by Burnett and Maybelle Watson in 1911. That common design was consummated and the resulting joint work copyrighted. But there was no such "joint laboring" by Burnett and Norton in 1912. The District Court found (Finding of Fact No. 2, R. 236) that there had been no collaboration between them.

The factual situation in the instant case paralleled that in *Harris v. Coca Cola Co.*, 73 F. (2d) 370 (C. C. A. 5th, 1934). As we have pointed out in our discussion of that case (*supra*, pp. 14 to 18), the question of joint authorship, while not discussed in the court's opinion therein, was presented by the record. Judge Learned Hand, writing for the Circuit Court of Appeals for the Second Circuit in the *Edward B. Marks Music Corp.* case, *supra*, clearly perceived the significance of the *Coca-Cola* case and found it necessary to distinguish it.

The ground of his distinction exactly fits the instant case. He said (140 F. (2d), p. 268):

"It is true that the court refused to pass on that question, but still the opinion lends no color to the plaintiff's position; for, even though Harris could be said to have composed the script in a joint design with Church and Moser, he clearly could not then have had in mind Frost's illustrations, made fifteen years later. Though he may have been a 'joint author' with Church and Moser, he was not with Frost, for there was no change in the text."

The same view has been expressed in a leading textbook, *Ball, Law of Copyright*, p. 485-486 as follows:

"When one revises a copyrighted publication or produces a new version founded upon a previously copyrighted work, the author of the original work and the author of the new work are not joint owners \* \* \*."

The general importance of the decision of the Court below on joint authorship is manifest. It is a matter of common knowledge that songs, comprising both words and music, are frequently, and often successively, rewritten or

doctored up as to one of those elements, leaving the other untouched. The same is doubtless true with respect to other sorts of copyrightable material wherein there has been an original joint design involving more than one author, and later, perhaps many years later, the work has been changed by another author working alone and not with either of the original authors. If every time that happens a new "joint authorship" relation is created, and the category of those who have a renewal right or benefit from a renewal by one of the original authors is thus enlarged, the resulting extension of the field of works which will be subject to the copyright monopoly is manifest.

### III.

#### **THE 1912 VERSION OF THE SONG WAS NOT VALIDLY COPYRIGHTED BY BENNETT AS A "NEW WORK".**

Section 6 of the Act provides only that new works shall be "subject to copyright".

That means that the owner of a new version of a copyrighted work may, if he chooses, copyright it as a "new work". But he may equally elect to stand on the pre-existing copyright. If he chooses the former course, he must comply with the requirements of Section 18 in securing the new copyright. There is certainly nothing in Section 6 that makes the rules governing such compliance any less strict in the case of a new work.

A copyright confers a monopoly of the right of publication, which is purely statutory. Since this, like the patent monopoly, is in derogation of the public right, this Court has consistently held that the statutory method of securing it must be strictly observed. *Thompson v. Hub-*

*bard*, 131 U. S. 123, 148-150 (1888); *Mifflin v. R. H. White Co.*, 190 U. S. 260, 264 (1902); *DeJong & Co. v. Breuker & Kessler Co.*, 235 U. S. 33, 36-37 (1914).

Here, what Bennett was doing in 1912 was plainly stated in his copyright notice. It said that the work had been copyrighted by Burnett in 1911, and that the present publisher of the work, Bennett, was the proprietor by assignment of that copyright. That was the antithesis of a claim of copyright on a new work. Considered as a notice of copyright on a new work, Bennett's notice was not only defective as to date, but fatally defective for failure to state "the name of the copyright proprietor" (Sec. 18), for it did not state that Bennett was the proprietor of the work (words and music) which he was publishing, but only that he was the assignee of Burnett's 1911 copyright which, as related to the alleged "new work", applied only to the music. If Bennett had been undertaking to state the devolution of his title to the song as he was publishing it, he would have referred not only to Burnett's assignment to him of the copyright on the music, but to Norton's assignment to him of all his right, title and interest in the new words.

The Court below sought to justify its conclusion that Bennett obtained a valid copyright on the 1912 version by attributing to him an undisclosed "intent" to copyright a "new work", in the light of which, it said, the defects in his notice were mere "innocent errors" which could not mislead the public. It reached the latter conclusion on the ground that members of the public "should be chargeable with knowledge of such facts as reasonable inquiry would have disclosed" and that "an inquiry addressed to Bennett would have disclosed the latter's intent to copyright the 1912 ver-

sion". This reasoning is in the teeth of the opinion of this Court in *Mifflin v. R. H. White Co.*, 190 U. S. 260 (*supra*), at p. 264:

"It is incorrect to say that any form of notice is good which calls attention to the person of whom inquiry can be made and information obtained, since the right being purely statutory, the public may justly demand that the person claiming a monopoly of publication shall pursue, in substance at least, the statutory method of securing it. *Thompson v. Hubbard*, 131 U. S. 123."

In *Thompson v. Hubbard*, 131 U. S. 123 (*supra*), cited in the above-quoted passage, the infringement suit was by an assignee of the copyright against his assignor. The plaintiff assignee was held barred by reason of defects in the copyright notice printed on his own edition of a book, even though the defendant assignor obviously had full knowledge of the fact that the book had been originally validly copyrighted by him, the assignor.

It is plain, we submit, that the Court below erred in going behind the text of Bennett's copyright notice and relying on an undisclosed intent on his part to copyright something that he did not say he was copyrighting. Apart from that, the Court's imputation of such an intent to Bennett was sheer assumption, not justified by any evidence in the record. Indeed the evidence, and the inferences reasonably to be drawn from undisputed facts, point clearly to the opposite conclusion. It is undisputed that Bennett never deposited in the Copyright Office the two copies of the alleged new work, which Section 12 of the Act requires to be deposited "promptly" after publication. No copies of the 1912 version were deposited until September 29,

1938, and then not by Bennett, but by a subsequent assignee (Opinion of District Court, R. 232; Ex. 7, R. 150; Ex. 8, R. 151; Ex. 9, R. 152). It is true that this Court has held (not without dissent) in *Washingtonian Publishing Co. v. Pearson*, 306 U. S. 30 (1939), that the right to sue for infringement under the Act is not lost by mere delay (there fourteen months) in depositing copies under Section 12. But certainly there is nothing in that case to preclude consideration of the fact that no deposit was ever made by Bennett for its bearing on the question of whether or not he intended to copyright the work in question. Bennett was a music publisher, not a composer or author, and hence could be expected to be more careful about complying with the requirements of the Copyright Act with respect to any publication that he meant to copyright. The record indeed contains affirmative evidence indicating that Bennett intended to rely only on Burnett's 1911 copyright (R. 60-61). That protected him against the world on the music of the song. He held a bill of sale from Norton transferring to him all the latter's rights in the words of the song (Ex. 23, R. 171). He was thus fully protected against Norton; and the words were not of a sort likely to be used by someone other than Norton, except with the music with which they were to be associated by Bennett's publication.

Respondent's case is not aided by the curative provisions of Section 20 of the Act. That section does not apply where, as here, the notice itself was defective, but only to the omission by accident or mistake of the prescribed notice "from a particular copy or copies". As Judge Patterson said in *Goes Lithographing Co. v. Apt Lithographic Co.*, 14 F. Supp. 620 (D. C. S. D. N. Y., 1936), at page 621:

"This provision does not give relief in a case where the essentials of notice were omitted from all copies, but only where they were omitted from a limited number of copies."

It is true that the position taken by petitioner on this point in its complaint was inconsistent with that taken by it at the trial, for it alleged (Complaint, Par. Twenty-sixth, R. 6) that Bennett secured a valid copyright on the song in the form in which he published it. But respondent took an equally inconsistent position, because it denied (Amended Answer, Par. Thirteenth, R. 21) the allegations of Paragraph Twenty-sixth of the complaint that Bennett duly complied with the copyright law and secured a copyright for the new matter in the song as published by him. The District Court disposed of respondent's claim of estoppel against petitioner (Opinion, R. 235), and the inconsistencies in the prior positions of both parties are of no moment here. The issue created by the pleadings above referred to was resolved by the proofs at the trial, and the question now is of the correctness of the decision of the Court below on the record so made.

### CONCLUSION

**THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.**

Respectfully submitted,

CHARLES E. HUGHES, JR.,  
*Counsel for Petitioner*

LEO J. ROSETT,  
RICHARD W. HOGUE, JR.,  
EDWARD A. NILES,  
*Of Counsel*

April 4, 1947.





## APPENDIX

### PERTINENT PROVISIONS OF COPYRIGHT ACT OF 1909, AS AMENDED.

§1. **Exclusive rights as to copyrighted works.** Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

\* \* \* \* \*

(e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit; and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced:

\* \* \* \* \*

§6. **Copyright on compilations of works in public domain or of copyrighted works; subsisting copyrights not affected.** Compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works.

\* \* \* \* \*

**§8. Authors or proprietors, entitled; aliens.** The author or proprietor of any work made the subject of copyright by this title, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this title:

**§9. Publication of work with notice.** Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 21 of this title.

\* \* \* \* \*

**§11. Works not produced for sale.** Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; of a title and description, with one print taken from each scene or act, if the work be a motion-picture photoplay; of a photographic print if the work be a photograph; of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay; or of a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections 12 and 13 of this title, where the work is later reproduced in copies for sale.

**§12. Deposit of copies after publication; action or proceeding for infringement.** After copyright has been secured by publication of the work with the notice of copy-

right as provided in section 9 of this title, there shall be promptly deposited in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, \* \* \* or if the work is not reproduced in copies for sale there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section 11 of this title, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with.

\* \* \* \* \*

**§18. Notice; form.** The notice of copyright required by section 9 of this title shall consist either of the word "Copyright" or the abbreviation "Copr.", accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication.

\* \* \* \* \*

**§20. Same; effect of accidental omission from copy or copies.** Where the copyright proprietor has sought to comply with the provisions of this title with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice; and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct.

\* \* \* \* \*

§23. **Duration; renewal and extension.** The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided*, That in the case of posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication. (As amended Mar. 15, 1940, c. 57, 54 Stat. 51.)

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**Supreme Court of the United States**

**OCTOBER TERM, 1946**

**No. 1199**

SHAPIRO, BERNSTEIN & Co., Inc.,

*Petitioner,*

against

JERRY VOGEL MUSIC Co., Inc.,

*Respondent.*

**RESPONDENT'S BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

/ ARTHUR F. DRISCOLL,  
*Counsel for Respondent.*

MILTON M. ROSENBLOOM,  
WILLIAM S. ROACH,  
*of Counsel.*



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# Supreme Court of the United States

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SHAPIRO, BERNSTEIN & Co., INC.,

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner seeks to review the judgment of the Circuit Court of Appeals for the Second Circuit entered on December 10, 1946 (R. 262-263), which reversed a judgment of the United States District Court for the Southern District of New York, in favor of petitioner, entered on November 20, 1945 (R. 245-250).

### Opinions Below

The opinion of the Circuit Court is reported at 158 F. (2d) 759 (R. 256-262).

On February 24, 1947, the respondent moved in the Circuit Court for a clarification of that Court's opinion. This motion was decided with a *per curiam* opinion on March 18, 1947, which is not yet officially reported (R. 278-279).

The motion pertained to matters connected with the entry of a decree by the District Court on the mandate of the Circuit Court (R. 262-277). These matters are not in-

volved in this proceeding, as is indicated by the petition (p. 6).

The opinion of the District Court is not yet officially reported (R. 230-235).

### **Introductory Statement**

Petitioner is the successor in interest of the writer of the music of a well-known old song called "My Melancholy Baby".

Respondent is the successor in interest of the writer of the lyrics of said song.

Petitioner sued for a declaratory judgment claiming sole title to the copyright for the renewal term on this song (Compl. R. 4-16).

Respondent claims joint ownership of the copyright for the renewal term, and by way of counterclaim sought a judgment to that effect (Ans. R. 24-26).

The District Court held that the lyrics were in the public domain because of the failure of a proper person to file a renewal notice; that the music was protected by an earlier copyright on the unpublished manuscript, which had been renewed; that petitioner was the sole owner of that copyright. The Court therefore entered judgment for the petitioner (R. 245-250).

The Circuit Court reversed the judgment of the District Court, holding that the copyright on the published work, consisting of the music and lyrics, was properly renewed and that petitioner and respondent were joint owners of the copyright on the combined work or song (R. 256-262).

### **Facts**

The essential facts are undisputed.

In 1911 Ernie Burnett wrote the music and his wife (known as Maybelle E. Watson) wrote the words of a song

entitled "Melancholy". This song was registered for copyright in October, 1911, as an unpublished work, in Burnett's name (Ex. 1, R. 142, 30). That manuscript was never published.

Burnett tried to sell the unpublished song to a music publisher named Theron C. Bennett (R. 83-84). Bennett liked the music but did not like the words and obtained Burnett's consent to have George A. Norton, a well-known lyric writer, write new words (R. 85-87).

Bennett then published the "new work", which consisted of Burnett's melody and Norton's lyrics, with notice of copyright.\* It was first published in October, 1912 (Ex. 4, R. 146, 32). It was this song (music by Burnett and words by Norton) that was exploited, achieved great popularity and was successful. The copyright notice on the "new work" stated:

"Copyright MCMXI by Ernie Burnett.

Copyright transferred MCMXII to Theron C. Bennett, Denver, Colo."

This notice, although imperfect, accomplished the purpose intended by the statute, viz., a warning to the world that the work was protected by copyright (see *infra*, p. 16).

Bennett executed a royalty contract with each author (R. 97).

On October 23, 1912, Bennett bought Norton's interest in the song (Ex. 23, R. 171, 39). This sale by its terms did not apply to the renewal term of copyright.†

On November 5, 1914, Bennett changed the title of the song from "Melancholy" to "My Melancholy Baby" and added a chorus in march time (referred to as the "1914 version"—Ex. 6, R. 148, 32). From that time on the song was published under the title "My Melancholy Baby".

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\* The Copyright Act provides that copyright on a published work is secured solely by publication with the required notice of copyright (17 U. S. C., Section 9).

† In any case it would have applied only to the original copyright since Norton died during the original term of copyright (*Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U. S. 643).

Through mesne assignments Bennett's interest in the song passed to the petitioner (Exs. 8, 9, 10, 11, R. 151-156, 33-34).

Throughout the record reference is made to three different versions of the song and the copyrights on each. They consist of the following:

FIRST: The original song entitled "Melancholy", consisting of music written by Burnett and lyrics written by Maybelle Watson (then Mrs. Burnett), which was copyrighted as an unpublished work in 1911 (Exs. 1, 2, R. 142, 30-31).

SECOND: The song published with copyright notice in 1912 by Bennett, entitled "Melancholy" consisting of the same music by Burnett and entirely new lyrics written by Norton, which were substituted for the Watson lyrics with the knowledge and consent of all parties concerned (Ex. 4, R. 146, 32).\*

THIRD: The song published in 1914 with copyright notice by Bennett, which was identical with the 1912 version, except that its title was changed from "Melancholy" to "My Melancholy Baby" and that there was also added a chorus in march time (Ex. 6, R. 148, 32).

One of petitioner's predecessors, Joe Morris Music Company (successor to Bennett's catalogue)†, filed two copies of the 1912 published version in the Copyright Office on January 10, 1939 (Ex. 5, R. 148, 32), and also two copies of the 1914 published version on September 29, 1938 (Ex. 7, R. 150, 33).

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\* It was this version of the song, copyrighted by Bennett in 1912 by publishing it with notice, that achieved success and fame. It is the work concerned in this proceeding.

† Bennett did not deposit copies of the song. This was subsequently done by one of his successors in interest, Joe Morris Music Company. However, the law is now clear that the mere delay or even failure to make such deposit does not invalidate a copyright (*Washington Pub. Co. v. Pearson*, 306 U. S. 30; see *infra*, p. 15).

On November 1, 1938, Burnett filed a notice of renewal of copyright on the 1911 unpublished version (Ex. 13, R. 158, 34).

On December 2, 1939, Burnett filed notice of renewal of the copyright on the 1912 published version (Ex. 15, R. 161, 35). The renewal notice recites "words by George A. Norton, music by Ernie Burnett" and gives the original publication date as of October 25, 1912.

On October 23, 1942, Burnett filed notice of renewal of the copyright on the 1914 version (Ex. 17, R. 164, 35).

Norton, author of the lyrics, died in 1923 during the original term of copyright (Ans. par. 29 R. 24; Reply par. 2 R. 26-27). He left no widow (Ex. A, R. 172, 100). He did leave a son (an only child), Charles E. Norton, Jr., who was his statutory successor under Section 23 of the Copyright Act (Petition p. 5).

On September 15, 1942, there was filed on behalf of Charles E. Norton, Jr., a notice of renewal of copyright on the 1914 version (Ex. G, R. 199, 113).

On August 6, 1942, Norton, Jr., assigned his interest in the renewal copyright on both the 1912 and 1914 versions to the respondent (Ex. F, R. 195-198, 113).

### **Petitioner's Specification of Errors**

Petitioner raises no question with respect to the original or renewal copyright on the 1911 and 1914 versions, and therefore those copyrights are not an issue. It specifies only that the Circuit Court erred with respect to the copyright on the 1912 version:

- (1) In holding that Bennett obtained a valid copyright on the 1912 version of the song.
- (2) In holding that Burnett and Norton were joint authors of the 1912 version.

- (3) In holding that Burnett's attempted renewal of copyright on the 1912 version of the song was valid and timely.
- (4) In holding that any renewal of copyright by Burnett of the 1912 version of the song inured to the benefit of Norton's son.

The petitioner's "Questions Presented" (p. 3), briefly paraphrased, may be stated as follows:

- (1) Did Burnett have authority to renew the copyright on the 1912 version?
- (2) Were Burnett and Norton "joint authors" of the 1912 version, so that a renewal of the copyright by Burnett inured to the benefit of both?
- (3) Did the notice carried by the 1912 printed version of the song constitute compliance with the requirements of the Copyright Law so as to establish a valid copyright?

### Argument

Certiorari should be denied because the specifications of error and the reasons for granting the writ urged in the petition are without merit and wholly untenable. They are based on a misconception of the issues involved and ignore the express language of the Copyright Act. Moreover, there is no conflict between the decision below and that of another Circuit. The decision upon which petitioner relies to support such contention is easily distinguishable both upon its facts and the law applied (see *infra*, pp. 12-13).

Section 6 of the Copyright Act specifically permits the use of previously copyrighted material together with new matter for the creation of a copyrightable "new work". It provides, among other things:

" \* \* \* Copyrighted works when produced with the consent of the proprietor of the copyright of such

works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title" (17 U. S. C., Sec. 6).

Burnett, the copyright proprietor of the 1911 unpublished work and author of its music, consented to having Norton write new lyrics for the express purpose of combining his music with the "new matter" consisting of these lyrics (R. 85-87). Therefore, when Norton did write the new lyrics and they were joined with Burnett's music, the completed product which was the 1912 version constituted a "new work" upon which a copyright could be obtained, under the provisions of Section 6. When the publisher, Bennett, published the "new work" with notice of copyright, such copyright was properly obtained (17 U. S. C., Sec. 9; *Washington Pub. Co. v. Pearson*, 306 U. S. 30).

The Trial Court properly recognized the validity of the copyright on this "new work", the 1912 version (Opinion, R. 233). Indeed, no one ever questioned its validity until petitioner raised the question for the first time in the Circuit Court. In fact, petitioner and its predecessors in interest had actually relied upon its validity for many years, both during the entire original period of copyright and thereafter (Exs. 22, H; R. 170, 36, 200, 113; see Point IV, *infra*).

The Trial Court after acknowledging the validity of the 1912 copyright became confused between the right to renew that copyright and the extent of protection afforded by such renewed copyright when it came into existence. The petitioner now falls into the same error.

The 1911 copyright upon the original unpublished manuscript which included the music of Burnett was not extended in any manner by the 1912 copyright. In this connection Section 6 specifically states that:

"the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, \* \* \* or to secure or extend copyright in such original works."



There is no contention that Burnett's music could acquire additional or extended protection other than it already had from its original copyright, despite the fact that Burnett consented that it be used as part of a "new work". The situation presented here is the same as that where a work is first copyrighted under Section 11 of the Copyright Act as an unpublished work and later the same work is published with notice of copyright under Section 9 of the Copyright Act. The publication with notice of copyright which secures the copyright as a published work cannot extend the period of protection, which is 28 years commencing from the date of the deposit of the unpublished work (Weil, Copyright Law, p. 306). But it is clear that the mere fact that the term of protection commences from the date of registration as an unpublished copyright does not mean that the copyright on the published work is invalid.

Petitioner contends that the 1911 copyright on the unpublished version, consisting of Burnett's music and the Watson lyrics, was valid; that the 1912 copyright on the published version, consisting of Burnett's music and the Norton lyrics, was invalid, and that, therefore, Burnett's music is protected by copyright but Norton's lyrics are in the public domain. The inconsistency of such position is apparent.

Publication of a work without copyright notice is dedication to the public (*Universal Film Mfg. Co. v. Copperman*, 212 F. 301; Ball, Law of Copyright and Literary Property, pp. 147, 153). Publication with notice shows that such dedication is not intended (*Washington Pub. Co. v. Pearson*, supra).

If the 1912 publication by Bennett was without copyright protection, as petitioner contends, then the entire work consisting of Burnett's music and Norton's lyrics was dedicated to the public. But, argues petitioner, such result does not follow as to Burnett's music, because it was part of the unpublished manuscript registered for copyright in 1911, and the 1912 lyrics written by Norton,

unfortunately for respondent, had no such background or history.

Clearly petitioner is on the horns of a dilemma. If petitioner relies on the 1911 copyright on the unpublished version to protect the music which was published as part of the 1912 version, and contends that the 1912 copyright is invalid, then the effect is to claim for the 1911 copyright something that it does not encompass, namely, publication. Moreover, petitioner is flying in the face of Section 9 of the Copyright Act, which provides that copyright on a published work can be acquired only by publication with notice.

In other words petitioner says, in effect, that Bennett did not acquire copyright on the 1912 version, consisting of Burnett's music and Norton's lyrics, by publishing it with notice; but that the music continued to be protected since it was copyrighted in 1911 as part of an unpublished work. Petitioner thus urges the untenable proposition that the publication of 1912 was neither the securing of copyright on a "new work" in accordance with the requirements of the statute, nor was it a dedication to the public, except as to Norton's lyrics.

It is quite apparent that either the copyright on the 1912 published version was valid, as a copyright on a "new work" under Section 6, as respondent contends and as the Circuit Court held below, or the entire work which it purported to protect was dedicated to the public.

# I

**Burnett was the author of the music used in the 1912 version upon which copyright was properly acquired. As such author he was qualified under Section 23 of the Copyright Act to file a renewal notice.**

The author's right to renew under Section 23 of the Copyright Law is absolute. That section is wholly unconcerned with the extent or degree of the author's interest in the copyright thus renewed. The mere showing that he is an author of the work upon which the copyright is sought to

be renewed satisfies the requirements of that section. The fact that Burnett's contribution to the 1912 work was protected by a previous copyright did not make him any the less its author. If once he was its author then surely he remained its author. Section 23 reserves to an author, if he be living (or if he be dead, to his designated statutory successors), the right to file a renewal notice. It does not state that an author is an author merely for a specific or designated purpose. There is not one single word of limitation in that section. The authority granted in Section 6 was followed precisely in this case by Burnett when he permitted his copyrighted music to be joined with Norton's new lyrics to comprise a "new work", and Bennett, the publisher, properly obtained copyright on this "new work", the 1912 version of the song, by publishing it with notice of copyright. (See Point III, *infra*.)

Since the "new work" was clearly copyrightable under Section 6, it follows that the copyright obtained on it could be renewed under Section 23 by its authors, or their statutory successors, exactly in the same manner as any other copyrighted work. Consequently, Burnett's timely renewal notice, filed on December 2, 1939, was sufficient to renew the copyright on the 1912 published work (Ex. 15, R. 161, 35).

In *Jackson v. Quickship Co., Inc.*, 110 F. (2d) 731, C. C. A. 2d, Judge Patterson said at page 732:

"The degree of protection afforded by the copyright is determined by what is actually copyrightable in the card and not by its entire contents. *American Code Co. v. Bensinger*, 2 Cir., 282 F. 829; *Dorsey v. Old surety Life Ins. Co.*, 10 Cir., 98 F. (2d) 872, 119 A. L. R. 1250."

In *American Code Co. v. Bensinger*, 282 F. 829, C. C. A. 2d, Judge Rogers said at page 834:

"It is necessary, however, to keep in mind the distinction between copyrightability and the effect and

extent of the copyright when obtained. The degree or protection afforded by the copyright is measured by what is actually copyrightable in it, that is, by the degree and nature of the original work."

Irrespective of the degree of interest or extent of the protection Burnett acquired by the 1912 copyright, he was one of the contributing authors of the work which it protected. He met the requirements set forth in Section 23 of the Copyright Act and was within his right in filing a timely renewal notice within the twenty-eighth year of the copyright on the 1912 work.

The resulting renewal copyright inured to the benefit of all authors of the work or their statutory successors:

*Silverman v. Sunrise*, 273 F. 909, at 914 (C. C. A. 2d);

*Marks v. Vogel*, 47 F. Supp. 490 (Lovett, J.), *aff'd* 140 F. (2d) 266-268 (C. C. A. 2d);

*Marks v. Vogel*, 49 F. Supp. 135 (Knox, J.), *aff'd* 140 F. (2d) 270 (C. C. A. 2d);

*Marks v. Vogel*, 42 F. Supp. 859 (Leibell, J.).

The prevailing law was succinctly stated in *Marks v. Vogel*, 42 F. Supp. 859, by Judge Leibell at page 865:

" \* \* \* I am of the opinion that the renewal copyright obtained by a co-author of a joint work embraces the whole work, that his interest in the renewal copyright is that of an owner in common, that the renewal copyright enures to the benefit of his co-author or of those entitled to a renewal under the provisions of the Copyright Act, if that co-author be dead."

Since it is undisputed that respondent's assignor was Norton's proper statutory successor, it follows that he acquired rights in the renewal term which could be and were assigned to respondent.

**No Conflict Between Decision Below and that  
in the *Harris* Case**

There is no conflict to be resolved between the decision below and the decision of the Circuit Court of Appeals for the Fifth Circuit in *Harris v. Coca-Cola Co.*, 73 F. (2d) 370. The facts of the latter case are not even remotely similar to those in this case. The *Harris* case concerned a book written by Joel Chandler Harris which was copyrighted by a publisher in 1880 with illustrations by Church and Moser. In 1895 the same publisher eliminated the Church & Moser illustrations and substituted new illustrations by Frost, with which Harris had nothing to do, and again copyrighted it. After Harris died his widow renewed the 1880 copyright, which covered her husband's text and the Church & Moser illustrations. Some years later the Coca-Cola Co. used Frost's illustrations in its advertising and the widow sued for infringement. The Circuit Court properly held that Mrs. Harris had no copyrightable interest in Frost's illustrations.

It is quite evident that Mrs. Harris sued on the 1880 copyright.

The petitioner's own brief concedes that "Mrs. Harris had not applied for renewal of the 1895 copyright, and she had renewed the 1880 copyright" (p. 17). Petitioner's brief also admits that "It is true that the Court in the *Harris* case did not discuss the law of joint authorship" (p. 17).

The Copyright Law as it existed before 1909 contained a provision for the deposit of a subsequent edition of a copyrighted book wherein any substantial change had been made (Sec. 5 of the Act of March 3, 1891, 26 Stat. 1106, 1108).

The *Harris* case involved the question of whether the 1895 edition with the Frost illustrations enlarged the 1880 copyright on the Harris text and the Church and Moser illustrations, and the Court said in effect that it did not, and therefore Mrs. Harris had no copyrightable interest. The petitioner's own brief points to the definite distinction be-

tween the *Harris* case and this case "The Circuit Court (in the *Harris* case) held that the case reached a right result on the merits because the copyright of Mrs. Harris, that is, her renewal copyright (on the work published in 1880) did not cover the illustrations in the 1895 edition" (p. 15). Any allusions by the Court in the *Harris* case to the status of Harris as an author of the 1895 work were mere dicta, wholly unnecessary to the decision reached, since Mrs. Harris did not renew the 1895 work. Clearly the *Harris* case cannot be cited as a holding, which conflicts with the decision below in this case. There is no such issue involved in this case. The renewal notice filed by Burnett on December 2, 1939, recites that it renews a copyright now subsisting on a work which is a musical composition entitled "Melancholy" originally published on October 25, 1912, words by George A. Norton, and music by Ernie Burnett (Ex. 15, R. 161, 35). There is no doubt as to what the renewal notice covered or was intended to cover.

## II

**Burnett and Norton were joint authors of the 1912 version of the song "Melancholy".**

It appears to us that little of value can be added to the persuasive reasoning and logic of the Court below expressed in the following language:

"The appellee takes the position that Burnett and Norton were neither co-authors nor collaborators. We think they were. The words and music of a song constitute a 'musical composition' in which the two contributions merge into a single work to be performed as a unit for the pleasure of the hearers; they are not a 'composite' work, like the articles in an encyclopedia, but are as little separable for the purpose of copyright as are the individual musical notes which constitute the melody. All this we expounded in *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 Fed. 2d

266 (C. C. A. 2), where Marks composed words which were to be set to music by some unknown composer" (Opinion Circuit Court, R. 260).

The record clearly reveals that both authors intended that a "new work" be created (R. 85-91), which could be and was properly copyrighted under Section 6 (see *supra*, p. 7). It is wholly immaterial whether additional labor or collaboration was involved and it is difficult to see how that could have any possible bearing on the result. Certainly, there is nothing in Section 6 which requires additional labor or collaboration as a prerequisite of obtaining copyright on a "new work" consisting of old and new matter. The statute clearly excludes inquiry into any unfeasible fine-spun distinction, based on the extent of effort of a co-author.

Moreover, it was the intention of both Burnett and Norton that the completed song was to be an indivisible product. It was that product which was the result of their original joint design. It is logical that their intention with respect to the work ultimately produced be the controlling factor in determining whether it was a joint work or whether they be co-authors, rather than the amount or extent of their respective labor. Furthermore, it is familiar law that it was not necessary that their work be done simultaneously to constitute a joint effort, since they intended their contributions to be embodied in a single indivisible work to be performed and enjoyed as such.

What was said by Judge Learned Hand in *Marks v. Vogel*, 140 F. (2d) 266, at 267, is particularly apropos:

" \* \* \* the original copyright was of the song as a 'musical composition', and the renewal was in the same terms, \* \* \*. So far as appears, Marks therefore never meant to renew the copyright for the words alone, though we will assume that that made no difference, if he was entitled to do so. He was not; the song was not a 'composite' work, and it had to be renewed as a whole, or not at all, for it was the indivisible product of 'joint authors' \* \* \* it makes no difference whether the authors work in concert, or even

*whether they know each other; it is enough that they mean their contribution to be complementary in the sense that they are to be embodied in a single work to be performed as such. \* \* \* the words and the music were to be enjoyed and performed together; unlike the parts of a 'composite work', each of which is intended to be used separately, and whose only unity is that they are bound together. \* \* \** The popularity of a song turns upon both the words and the music; the share of each in its success cannot be appraised; they interpenetrate each other as much as the notes of the melody, or separate words of the 'lyric'. The value of the privilege of renewal is measured by the survival of their combined power to please the public taste." (Italics supplied.)

Although Section 6 was not involved in the *Marks* case, *supra*, the principles there set forth apply with equal force to the case at bar.

### III

**Bennett, the publisher, acquired copyright on the 1912 version of the song by publication thereof with proper notice of copyright.**

Section 9 of the Copyright Act provides:

"That any person entitled thereto by this Act may secure copyright for his work by publication thereof with notice of copyright required by this Act; \* \* \*"  
(17 U. S. C., Sec. 9).

This Court has established the law that it is not necessary to deposit anything in the Copyright Office to secure copyright on a published work.

In *Washington Pub. Co. v. Pearson*, 306 U. S. 30, Mr. Justice McReynolds said at page 37:

"\* \* \* and respondents rightly say, 'it is no longer necessary to deposit anything to secure a copyright of a published work, but only to publish with the notice of copyright'."



And at page 39:

"Petitioner's claim of copyright came to fruition immediately upon publication. Without further notice it was good against all the world. Its value depended upon the possibility of enforcement."

In *Davenport, etc. v. Century, etc.*, 18 F. Supp. 974, at 977, Judge Hulbert said:

"The essence of copyright is the publication with notice of copyright. 17 U. S. C. A. Sec. 9; *National Cloak & Suit Co. v. Kaufman*, 189 Fed. 215; *Universal Film Mfg. Co. v. Copperman*, 212 Fed. 301. Registration is merely a means of perfecting it. 17 U. S. C. A. Sec. 10."

#### **The Notice Required by the Statute**

Section 18 of the Copyright Act states:

"The notice of copyright required by Section 9 of this title shall consist either of the word 'Copyright' or the abbreviation 'Copr.' accompanied by the name of the copyright proprietor and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication" (17 U. S. C., Sec. 18).

The purpose of the statutory requirement as to notice is to tell the world that the "work" is restricted to its possible uses, and is not in the public domain (Ball, *The Law of Copyright and Literary Property*, Sec. 68, p. 156; Ladas, Vol. 2, *International Protection of Literary & Artistic Property*, Sec. 344, p. 740). As the Circuit Court below said:

"The purpose of a copyright notice is to prevent innocent persons who are unaware of the existence of the copyright from incurring the penalties of infringers by making use of the copyrighted work. See *Fleischer Studios v. Ralph A. Freundlich, Inc.*, 73 F. (2d) 276, 277 (C. C. A. 2), *cert. den.* 294 U. S. 717; *Lithographic Co. v. Sarony*, (111 U. S. 53, 55.)" (Opin. Circuit Ct., R. 259.)

Since the notice of copyright published on the 1912 version contained the essentials required in the statute, it was clearly sufficient. It contained the name of the copyright proprietor so that no one could be misled. It contained the word "Copyright" and it contained a date of publication (Ex. 4, R. 146, 32). Though perhaps technically defective in form, it accomplished the purpose intended by the statute. It was substantial compliance with the statutory requirement, which was all that was necessary (Ladas, *supra*, Sec. 345, p. 746).

The worst criticism that could be levelled at the notice is that the stated date of publication actually was one year prior in point of time to the year in which publication actually took place. That would not invalidate the copyright.

No one was misled, no fraud was committed and the mistake merely favored the public. It is undisputed that the error in date was wholly innocent and no one was harmed. This is illustrated particularly by the fact that the song had been published for thirty-three years prior to the initiation of this litigation by the petitioner and its predecessors and the validity of the notice was never raised throughout that period (see Point IV, *infra*). This circumstance in itself makes it most difficult to reconcile the petitioner's position in this litigation that the mistake in this notice was of the type that invalidates the copyright. The principle has long been accepted that an honest misstatement of the year of copyright in the copyright notice contained upon a published work does not invalidate the copyright if the year stated is earlier than the date of the first publication of the work. Its only effect is to shorten the term of copyright.

*Callaghan v. Myers*, 128 U. S. 617, at 657.

*Fleischer Studios v. Rudolph A. Freundlich, Inc.*, 73

F. (2d) 276, *cert. den.* 294 U. S. 717.

*American Code Co. v. Bensinger*, 282 F. 829, at 836 (C. C. A. 2d).

*Southern Music Pub. Co. et al. v. Bibo-Long, Inc.*, 10 F. Supp. 972.

The informality of acquiring copyright is recognized in the liberal interpretation of construction that the Courts have recommended (*Washington Pub. Co. v. Pearson*, supra).

It is urged that the provisions of the Copyright Act, as to notice should also be liberally construed. As this Court said in *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, at 346:

"The statute should not be 'so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant.'"

#### POINT IV

**Petitioner is without standing to attack the validity of the 1912 copyright.**

Petitioner's brief admits that the position it now takes with respect to the validity of the 1912 copyright is inconsistent with that which it took upon the trial (p. 29). It could have gone further and stated that the validity of the 1912 copyright was expressly upheld by the Trial Court, and that the petitioner did not appeal from the judgment below. The Trial Court said, among other things:

"Copyright to the 1912 version was originally secured by Bennett by publication with notice of copyright on October 25, 1912. \* \* \*

The only attempt to secure renewal rights on this version (1912) was made by Burnett on December 2, 1939" (Opinion, R. 233).  
\* \* \* \* \*

"It appears to us and we hold that Burnett had no copyrightable interest whatever in the 1912 version, and therefore had no interest in it which could be renewed" (Opinion, R. 235).

Thus the Trial Court made crystal clear that the 1912 copyright was valid and that its decision was based solely on the theory that Burnett had no right to renew it. This is confirmed by its conclusions of law which refer only to renewal rights.

"1. Renewal rights of the Norton lyric were lost for failure of any person entitled thereto timely to file claim therefor and that lyric is in the public domain.

2. Plaintiff owns the renewal rights to both titles and to the music of Burnett. Plaintiff is entitled to judgment for an injunction to protect its rights to the music and for damages for any violation if any of that right by the defendant and for an accounting to determine those damages" (R. 237).

Aside from the fact that petitioner accepted the ruling of the Trial Court without complaint, it is precluded from raising an issue in this respect by its past conduct both on equitable and procedural principles.

Petitioner for many years and until the close of the trial below proclaimed the validity of the 1912 copyright. It then became convinced that the record did not sustain its basic position, namely, that Norton wrote his famous lyrics as an employee for hire. Thereupon the petitioner expediently shifted its approach and attacked for the first time the validity of the 1912 copyright (R. 139-140). Petitioner conveniently forgot that for years it had asserted the validity of the 1912 copyright. In fact it had even sought to obtain the renewal rights to the 1912 copyright from relatives of Norton whom it believed were his statutory successors in interest (Exs. C, D, E, H, K, O, P, Q, R, S, T, U, V, W, X, Y, Z; R. 181, 183, 193, 200, 205, 213-224, incl.).

Petitioner went so far as to cause Norton's father to file a notice to renew the copyright on the 1912 version (Ex. E; R. 193, 112). Elliott Shapiro, an officer of petitioner, admitted that his company and its predecessors had filed at least two renewal notices to renew the copyright on the 1912 published version (R. 109).

Clearly the petitioner's present contention is an after-thought, conceived in desperation after the Trial Court had indicated an intention to reject its previous position. Indeed, petitioner had not even raised an issue on this point, for it alleged in its complaint that copyright was procured by Bennett on the 1912 version (Comp., par. 26, R. 6).

Surely these admissions cannot be lightly cast aside. Petitioner's previous actions are wholly inconsistent with the position it now takes that the 1912 copyright is invalid, and, to put it charitably, cast grave doubt upon its sincerity and good faith. It would be a novel procedural concept if petitioner were permitted at this late stage to abandon a position it has so vigorously maintained and to adopt the opposite position. It is utterly impossible to reconcile petitioner's past conduct with the position it takes before this Court.

### CONCLUSION

**The petition for a writ of certiorari should be denied.**

Respectfully submitted,

ARTHUR F. DRISCOLL,  
Counsel for Respondent.

MILTON M. ROSENBLOOM,  
WILLIAM S. ROACH,  
of Counsel.

April 23, 1947.

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